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EX PARTE OR LATE FILED

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street NW
Room 222
Washington DC 20554

Re: Ex Parte – Reciprocal Compensation for Dial-up Calls to ISPs, CC Docket No. 98-96; CPD No. 97-30

Dear Ms. Salas:

This letter responds to the December 16, 1998 letter from KMC Telecom, Inc. (KMC) on the captioned subject. KMC argues that the 8th Circuit U.S. Court of Appeals in Iowa Utilities Board v. FCC, 120 F.3d 753 (1997), ruled that the rates for transport and termination of all kinds of traffic -- regardless whether it is jurisdictionally intrastate or jurisdictionally interstate traffic -- are within the sole jurisdiction of the state commissions. However, the only way KMC can find support for this expansive overstatement within the 8th Circuit's decision is to quote carefully selected words completely out of context. Furthermore, in its recent decision reviewing the 8th Circuit's opinion the Supreme Court has made it even clearer that the FCC – not the states – should decide matters such as whether the 1996 Act's reciprocal compensation provisions apply to Internet traffic.[1]

KMC quotes the following excerpt from the 8th Circuit's decision: "subsections 252(c)(2) and 252(d)(2) clearly assign jurisdiction over the rates for the local competition provisions of the Act to the state commissions, thus avoiding the need to analyze the interstate/intrastate character of these services."[2] However, KMC conveniently fails to acknowledge the critical importance of the 8th Circuit's term "the local competition provisions of the Act." It is plain to see, from reading this entire section of the 8th Circuit's decision, that the Appellate Court only reached the above conclusion with respect to provisions of the Act which it correctly interpreted as applying only to the facilitation of local exchange service competition.

[1] AT&T v. Iowa Utility Board, 1999 WL 24568 (U.S., January 25, 1999).

[2] KMC 12-16-98 letter at p. 2, citing Iowa Utilities Board (incorrectly) at 120 F.3d at 798 (the language is actually at page 799).

For instance, also at page 799, the 8th Circuit said: "The Act primarily focuses on facilitating competition in local telephone service markets by imposing several new duties (interconnection, unbundled access, and resale – the local competition provisions) on incumbent local exchange carriers."[3] The Court went on to explain:

> Allowing competing telecommunications carriers to have direct access to an incumbent local exchange carrier's established network in order to enable the new carrier to provide competing general local exchange telephone services is an intrastate activity even though the local network thus invaded is sometimes used to originate or complete interstate calls.[4]

This quote shows clearly that the 8th Circuit properly viewed what it called "the local competition provisions of the Act" as intended by Congress to facilitate greater competition in the "local exchange telephone services" market. Indeed, it is only within that context that one can accurately view the limited wording quoted by KMC in its December 16, 1998 letter. Thus, for KMC's point to be valid, it would have to concede that Internet service is a "local exchange telephone service," and no one can seriously suggest that such is the case.

The 8th Circuit said only that the rates for the local competition provisions of the Act (which include, in the Court's interpretation, the transport and termination of traffic[5]), are within the exclusive province of the states only in so far as those provisions are used for the purpose intended by Congress – increased competition for "local telephone services." It is plain beyond debate that a CLEC which connects to an ILEC's network solely to funnel originating traffic from the ILEC's end users to an Internet Service Provider (ISP), and therefore on to virtually anywhere else in the world, is not engaging in anything that could even conceivably be called "local exchange telephone service competition." Indeed, in the most closely analogous industry situation – where a CLEC seeks to utilize "the local competition provisions of the Act" solely to originate or terminate purely interstate voice traffic – even KMC acknowledges that the 8th Circuit found that use to be within the exclusive jurisdiction of the FCC, in upholding the FCC's ongoing authority over interstate access charges.[6]

The Supreme Court's recent decision reviewing the 8th Circuit's opinion did nothing to disturb the above-described holding and rationale of the Appellate Court. In fact, while affirming the 8th Circuit's finding that actually setting the rates for the local competition provisions of the Act is within the exclusive province of the states, the High Court reversed the 8th Circuit's determination that the FCC has no authority at all over that area. The Supreme Court specifically found that "the FCC has rulemaking authority

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[3] Iowa Utilities Board at 799 (second emphasis added, first and third emphases in original).
[4] Id. (emphasis added).
[5] Id.
[6] KMC December 16, 1998 letter at p. 3.

to carry out the 'provisions of this Act,' which include Sections 251 and 252 . . ."[7] By way of example, the High Court ruled that the FCC has the power to issue "rules to guide the state commission judgments" in such areas as establishing state rates,[8] state review of pre-existing interconnection agreements,[9] and state decisions regarding rural exemptions for certain Act requirements.[10] Thus, the Supreme Court's decision removes any possible doubt that the FCC is empowered to promulgate rules to guide the states regarding the types of traffic for which Section 252 reciprocal compensation will or will not apply, as it has in fact already done (Local Competition Order, para. 1034, holding that such compensation does not apply to any interstate or interexchange traffic, which Internet traffic clearly is).[11]

KMC's next proposition is equally unsupportable. It argues that the 8th Circuit's decision should be read to have "implicitly" vacated the Commission's determination in the Local Competition Order that reciprocal compensation under Section 251(b)(5) applies only to local traffic, and not to interstate or interexchange traffic.[12] Underscoring the implausibility of this argument is the fact that no party to either the 8th Circuit case or the Supreme Court case even challenged that portion of the Commission's Order.[13] No matter how strongly KMC wishes otherwise, that portion of the Commission's Order remains the law, and now controls on the issue of ISP compensation under Sections 251 and 252.

KMC next boldly asserts, without any explanation as to how it could possibly know, that ILEC/CLEC Section 251 interconnection agreements today cover all traffic that can be exchanged between them, including both intrastate and interstate. SBC doubts very seriously that KMC has read every current Section 251 interconnection agreement in the nation, and knows that it certainly has not read all of SBC's agreements. Many of SBC's agreements expressly exclude interstate traffic from the Section 251 reciprocal compensation obligation, as do many of the other ILECs' agreements (which SBC has learned from numerous discussions on this issue with representatives of other large ILECs).

The next argument in KMC's latest letter is its startling claim that "the Commission is required to determine that for purposes of reciprocal compensation the telecommunications portion of a dial-up call to an ISP terminates when it reaches the

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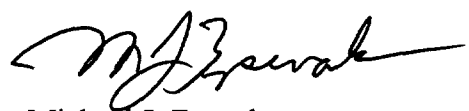
[7] AT&T v. Iowa Utilities Board, Slip Op. at 7.
[8] Id. at 7-10.
[9] Id. at 10.
[10] Id.
[11] It is true that the Supreme Court did not disturb the 8th Circuit's holding that, notwithstanding FCC rules, states retain authority to adopt rules and policies that are otherwise consistent with the Act. Iowa Utilities Board, 120 F.3d at 806-07. However, as already noted, it would be patently inconsistent with the 1996 Act for any state to conclude that Internet traffic is subject to reciprocal compensation under the local competition provisions of the Act.
[12] Id. at p. 2.
[13] Local competition Order, at para. 1034.

ISP."[14] This KMC claim is mooted by the fact that the Commission has already ruled that there is only one call in such a service scenario, not two as KMC asserts.[15] Moreover, the Commission has found that this single call is a combination of telecommunications and information service, since the information service must "ride" some form of telecommunications service in order to work at all.[16]

The Commission should step up to the many years of existing legal precedent indicating clearly that calls destined for an ISP are properly considered jurisdictionally interstate in nature and that, therefore, under existing law as established by the Commission at para. 1034 of its Local Competition Order, such calls are not legally subject to Section 251 reciprocal compensation obligations.

Respectfully Submitted,



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[14] KMC December 16, 1998 letter at p. 4.
[15] Memorandum Opinion and Order in CC Docket No. 98-79 (GTE ADSL Tariffs), FCC 98-292, released October 30, 1998, para. 20.
[16] Id. The Commission also rejected KMC's ESP exemption argument (KMC at p. 3) in this Order, at para. 21.